EXHIBIT 5

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
SPANIERMAN GALLERY, PSP, a Profit Sharing Plan, Spanierman Gallery, LLC, and Adelson Galleries, Inc. Plaintiffs,
v.
Richard LOVE, R.H. Love Galleries, Inc., R.H. Love Contemporary, Inc., R.H. Love, LLC, and R.H. Love Galleries, Defendants.
No. 03 Civ.3188 VM.

Oct. 31, 2003.

Seller initiated action against buyers, asserting various claims, arising from buyers' alleged sale of artwork to third party before having paid seller for it in accordance with contract. Defendants moved to dismiss claims against non-signatory defendants and non-contract claims. The District Court, Marrero, J., held that: (1) absent showing specific wrongful conduct by non-signatories, corporate veil was not pierced; (2) allegations based on breach of contract failed to state tort claims or quasi contract claims; (3) allegations of misrepresentations were insufficient to state claim for fraud; and (4) punitive damages were not available.

Motion granted.

West Headnotes

[1] Corporations ⚷1.6(2)
101k1.6(2) Most Cited Cases
In action arising from company's sale of artwork to third party before having paid for it in accordance with its contract with gallery, mere fact that officer of company allegedly had decision-making power with respect to both signatory and non-signatory companies was not enough, under New York law, absent showing specific wrongful conduct by non-signatories, to pierce corporate veil, for purpose of stating breach of contract claim against officer and other non-signatories.

[2] Fraud ⚷32
184k32 Most Cited Cases

[2] Trover and Conversion ⚷13
389k13 Most Cited Cases
In action involving contract which had specified that buyers would not obtain title to artwork, and thereby right to sell, until full payment was made, alleged sales of artwork by buyer to third party before paying seller, in accordance with contract, breached contractual duty, and absent allegation of distinct harm or distinct duty, failed to give rise to tort actions for fraud or conversion under New York law.

[3] Implied and Constructive Contracts ⚷55
205Hk55 Most Cited Cases
Under New York law, existence of valid and enforceable written contract governing particular subject matter ordinarily precludes recovery in quasi contract for events arising out of same subject matter.

[4] Federal Civil Procedure ⚷636
170Ak636 Most Cited Cases
In action against buyer of artwork for breach of contract, allegations which did not specify in any detail who said what, or when regarding alleged deliberately and intentionally made false statements and representation of buyer's intention to purchase relevant artwork were insufficient to state claim for fraud. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[5] Damages ⚷89(2)
115k89(2) Most Cited Cases

Under New York law, punitive damages were not available for breach of contract arising from buyer's sale of artwork to third party before having paid sellers for it in accordance with contract, absent allegation that buyers' conduct was part of pattern of conduct directed at public generally or evinced particularly high degree of bad faith.

DECISION AND ORDER

MARRERO, J.

***1** In this diversity action, plaintiffs Spanierman Gallery, PSP, Spanierman Gallery, LLC, and Adelson Galleries, Inc. (collectively, "Plaintiffs") allege that defendants R.H. Love Galleries, R.H. Love Galleries, Inc., R.H. Love Contemporary, Inc., R.H. Love, LLC, and individual defendant Richard Love (collectively, "Defendants") purchased four pieces of art from Plaintiffs, and then re-sold them without ever having completed the payments to Plaintiffs. The complaint alleges twenty-seven causes of action, asserting contract, quasi-contract and tort claims, most of which Defendants now seek to dismiss. For the reasons discussed, Defendants' motion to dismiss is granted.

I. *BACKGROUND* [FN1]

FN1. The factual summary that follows is based on facts as alleged in the Complaint and the exhibits attached. No specific citation to the Complaint will be made, except where necessary.

On each of four occasions in late 2002 and early 2003, Plaintiffs entered into a contract with either R.H. Love Galleries or R.H. Love Galleries, Inc. (the "Signatory Defendants") to sell a piece of artwork. Plaintiffs allege that the Signatory Defendants sold all four pieces to unspecified third parties before having paid Plaintiffs in accordance with the respective contracts. Plaintiffs seek to hold liable the Signatory Defendants, along with defendants R.H. Love Contemporary, Inc., R.H. Love, LLC, and an individual defendant named Richard Love (collectively the "Non-Signatory Defendants"), who allegedly controls all of the defendant companies. The four contracts at issue specify that title to the artwork does not pass to the buyer until the buyer has paid in full. [FN2] R.H. Love Galleries allegedly admitted to having re-sold three of the pieces but would not reveal the third-party buyer. Plaintiffs state, upon information and belief, that the fourth piece was sold as well. Plaintiffs' causes of action are for (1) replevin, (2) breach of contract, (3) conversion, (4) violation of the Uniform Commercial Code; (5) punitive damages; (6) fraud; (7) constructive trust; (8) unjust enrichment; and (9) attorneys' fees. [FN3] Defendants argue, in short, that Plaintiffs' elaborate complaint states nothing more than an ordinary breach of contract claim. As such, Defendants argue that claims against all the Non-Signatory Defendants must be dismissed, along with the duplicative tort and quasi-contract claims and the claim for punitive damages.

FN2. Plaintiffs allege that the Signatory Defendants failed to complete payment on any of the pieces. Accordingly, Spanierman Gallery, PSP, and Spanierman Gallery, LLC, co-own two of the pieces, and Spanierman Gallery, LLC, co-owns the third piece with Adelson Galleries, Inc. ("Adelson"), who solely owns the fourth piece.

FN3. The Plaintiffs allege each of these nine causes of action separately on behalf of (1) Spanierman Gallery, PSP, and Spanierman Gallery, LLC, jointly; (2) Spanierman Gallery, LLC and Adelson jointly; and (3) Adelson.

II. *STANDARD FOR MOTION TO DISMISS*

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court "must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff." *Bernheim v. Litt,* 79 F.3d 318, 321 (2d Cir.1996) (citation omitted). However, the Court need not credit conclusory statements unsupported by factual assertions, nor is the Court "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain,* 478 U.S.

265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). The Court may not grant the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

III. *DISCUSSION*

A. *CLAIMS AGAINST NON-SIGNATORY DEFENDANTS*

***2** Defendants argue that Richard Love cannot be held liable on the contracts because he signed the contracts in his capacity as an officer of the Signatory Defendants, not in his individual capacity, and that the other Non-Signatory Defendants cannot be held liable on the contracts for the simple reason that they did not sign the contracts. Plaintiffs respond that they have sufficiently alleged that Richard Love controls all of the defendant companies, such that the Court may pierce the corporate veil all around:

> Upon information and belief, all Defendants are inextricably intertwined financially and are inextricably intertwined as a matter of law by the fact that, Defendant Richard H. Love is the primary principal of the remaining Defendants and that Defendant Richard H. Love controls the decision making aspects of all Defendants. Defendant Richard H. Love was the individual who executed all contracts referred to hereinabove. Both Plaintiffs interacted primarily with Defendant Richard H. Love regarding the sale of the five above-referenced works of art.

Compl. ¶ 34. [FN4]

> FN4. This paragraph indicates that there were five works of art at issue, but the Court could only identify four from the Complaint.

[1] Although there are no definitive rules governing the circumstances when the corporate veil may be pierced under New York law, the New York Court of Appeals has held that it generally requires a showing that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. New York State Dep't of Taxation and Finance,* 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157, 1160-61 (N.Y.1993). Plaintiffs' allegations, even liberally construed, fail to allege any facts supporting such an inference. The facts in the complaint suggest only that the Signatory Defendants breached the sales contracts by failing to pay, and by selling the artwork before having fully paid. There are no factual allegations suggesting specific fraudulent or otherwise wrongful behavior on the part of the Non-Signatory Defendants. [FN5]

> FN5. To the extent that Plaintiffs' cause of action for fraud as against all Defendants might support piercing the corporate veil, those allegations are plainly deficient under Federal Rule of Civil Procedure 9(b), as explained more fully, *infra* at III.C.

The mere fact that Richard Love may have decision-making power with respect to both the Signatory and Non-Signatory Defendants is not enough to pierce the corporate veil, without a showing of some specific wrongful conduct by the Non-Signatory Defendants. [FN6] *See id.* at 1161 ("While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business ..., such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required." (citations omitted)); *Weis v. Selected Meat Packers, Inc.,* 91 A.D.2d 1085, 458 N.Y.S.2d 313, 314 (App. Div.3d Dep't 1983). Were the Court to hold otherwise, Richard Love could be subject to liability for every act of the defendant companies, defeating, in large part, the purpose of the corporate form. *Cf. Walkovszky v. Carlton,* 18 N.Y.2d 414, 276 N.Y.S.2d 585, 223 N.E.2d 6, 9 (N.Y.1966) ("If Carlton were to be held individually liable on those facts alone, the decision would apply equally to the thousands of cabs which are owned by their individual drivers who conduct their businesses through corporations...."). Accordingly, the Court will dismiss the contract claims as against the Non-Signatory Defendants.

FN6. Portions of Plaintiffs' briefing imply that Richard Love may have improperly distributed the proceeds from the third-party artwork sales at issue among the companies he controls, including companies which are Non-Signatory Defendants. This allegation is not contained in the complaint and is thus not part of the Court's consideration at this time.

***3** The remaining claims against the Non-Signatory Defendants must fail, as well, because the complaint makes no separate factual allegations of wrongful conduct by the Non-Signatory Defendants. The complaint combines the Signatory and Non-Signatory Defendants under the name "Defendants," and alleges, in essence, that these "Defendants" failed to fulfill their *contractual* obligations. Although the complaint deploys the legal language of the respective non-contract causes of action, there are no underlying facts alleged, except that "Defendants" breached the contracts. For example, the replevin cause of action states that "Defendants have failed to make payment *as required by the ... Contracts* ...." (Compl. ¶ 41; *see also id.* ¶¶ 95, 148). The conversion cause of action states that "Defendants divested themselves of the ... Artworks prior to making full payment *pursuant to the contract."* (*Id.* ¶ 58, 276 N.Y.S.2d 585, 223 N.E.2d 6; *see also id.* ¶¶ 112, 165). The constructive trust cause of action states, "Defendants made an express promise ... to purchase the ... Artwork ... *pursuant to the ... Contract."* (*Id.* ¶ 79, 276 N.Y.S.2d 585, 223 N.E.2d 6; *see also id.* ¶¶ 132, 185). Finally, the unjust enrichment cause of action states, "Defendants have failed to pay *pursuant to these Contracts."* (*Id.* ¶ 85, 276 N.Y.S.2d 585, 223 N.E.2d 6; *see also id.* ¶¶ 138, 192).

In sum, because the Plaintiffs have alleged no facts suggesting that the Non-Signatory Defendants are either bound by and breached the contracts (*e.g.*, by piercing the corporate veil), or committed other wrongs distinct from the contractual breach, the Court must dismiss all claims against the Non-Signatory Defendants. The Court will grant Plaintiffs leave to file an amended complaint within thirty (30) days of the date of this Order. If Plaintiffs fail to cure the deficiencies relating to all of the claims described above within this time period, the Court will dismiss these claims with prejudice. [FN7]

FN7. The Court does not address the Defendants' related claim that this Court does not have jurisdiction over the Non-Signatory Defendants.

B. *DUPLICATIVE CLAIMS AGAINST SIGNATORY DEFENDANTS*

Defendants argue that the Plaintiffs' claims for conversion, replevin, and fraud are duplicative of Plaintiffs' breach of contract claim and therefore must be dismissed as against the Signatory Defendants. The Court agrees. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.... this legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190, 193 (N.Y.1987) (citations omitted). In other words, "where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory." *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 583 N.Y.S.2d 957, 593 N.E.2d 1365, 1369 (N.Y.1992); *see also Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897, 899 (2d Cir.1980) ("If the only interest at stake is that of holding the defendant to a promise, the courts have said that the plaintiff may not transmogrify the contract claim into one for tort.").

***4** [2] Plaintiffs' claims of conversion, replevin and fraud arise only from the allegation that Defendants prematurely sold artwork for which they had not paid, *in violation of the contracts.* Plaintiffs do not allege any distinct harm nor do they allege any distinct duties giving rise to tort liability. [FN8] Thus, the Court will dismiss, with prejudice, Plaintiffs' claims for conversion, replevin, and fraud as against the Signatory Defendants.

FN8. Plaintiffs argue that reselling the artwork was a separate act constituting fraud, independent of the breach of contract. The Court disagrees. The contracts specify that the buyers would not obtain title, and thereby the right to sell, until full payment was made. In other words, the alleged sales breached a *contractual* duty, thereby precluding overlapping tort actions.

[3] Defendants argue that Plaintiffs' quasi-contract claims of unjust enrichment and constructive trust are duplicative of Plaintiffs' contract claims and therefore also should be dismissed as against the Signatory Defendants. Again, the Court agrees. The New York Court of Appeals has held that the "existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc.,* 521 N.Y.S.2d 653, 516 N.E.2d at 193; *see also Briggs v. Goodyear Tire & Rubber Co.,* 79 F.Supp.2d 228, 236 (W.D.N.Y.1999) (dismissing unjust enrichment and constructive trust claims).

The Court will dismiss, with prejudice, the unjust enrichment and constructive trust claims as against the Signatory Defendants because those claims are duplicative of the breach of contract claim and because, as above, Plaintiffs have failed to allege any distinct harm or actions giving rise to any separate claim of unjust enrichment or constructive trust.

C. *FRAUD*

In addition to the fact that Plaintiffs' fraud claim is duplicative of the contract claim, *supra* at III.B, Plaintiffs' fraud claim falls far short of the pleading requirements of Federal Rule of Civil Procedure 9(b), which states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). "To satisfy the particularity requirement of Rule 9(b), a complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *Cosmas v. Hassett,* 886 F.2d 8, 11 (2d Cir.1989) (citing *Goldman v. Belden,* 754 F.2d 1059, 1069-70 (2d Cir.1985)). Mere "conclusory allegations to the effect that defendant's conduct was fraudulent ... are insufficient." *Shemtob v. Shearson, Hammill & Co.,* 448 F.2d 442, 444 (2d Cr.1971).

[4] The allegations in the Complaint fail to specify in any detail who said what, or when. For example, the complaint states, without any further elaboration, "Defendants deliberately and intentionally made false statements and representations to Plaintiffs Spanierman regarding their intention to purchase the relevant artwork." (Compl.¶ 72.) These allegations are obviously insufficient. [FN9] Accordingly, Plaintiffs' claim of fraud is dismissed, with prejudice, as to all Defendants.

FN9. The implication of the above-quoted paragraph is that Defendants fraudulently represented that they would perform their contractual obligations. However, even apart from the Rule 9(b) deficiency, the claim must be dismissed because a "fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it...." *Gordon v. Dino De Laurentiis Corp.,* 141 A.D.2d 435, 529 N.Y.S.2d 777, 779 (App. Div. 1st Dep't 1988).

D. *PUNITIVE DAMAGES*

***5** [5] Defendants argue that Plaintiffs' claim for punitive damages must by dismissed because punitive damages are not available for a mere breach of contract, and because there is no allegation that Defendants' conduct was aimed at the public generally. Defendants are correct that, among other limitations, punitive damages are only available in breach of contract cases "where the conduct constituting, accompanying, or associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available." *Rocanova v. Equitable Life Assurance Soc'y of United States,* 83 N.Y.2d 603, 612 N.Y.S.2d 339, 634 N.E.2d 940, 943-44 (N.Y.1994). Because the Court has dismissed all the independent tort actions, the claim for punitive damages will be dismissed, as well. Alternatively, the Court also agrees with Defendants that Plaintiffs have failed to allege that Defendants' conduct was "part of a pattern [of conduct] directed at the public generally." *New York Univ. v. Continental Ins. Co.,* 87 N.Y.2d 308, 639 N.Y.S.2d 283, 662 N.E.2d 763, 767 (N.Y.1995). [FN10] The Court will grant Plaintiffs thirty (30) days to cure this deficiency in an amended complaint; otherwise, the claim for punitive damages will be dismissed with prejudice.

FN10. This Court has recently recognized that the controlling case law on the "public aim" requirement for punitive damages under New York law is "quite divided, and [that] the task of reconciling these varying interpretations is formidable." *TVT Records v. Island Def Jam Music Group,* 262 F.Supp.2d 188, 194-95 (S.D.N.Y.2003) (footnote omitted). In *TVT,* the Court concluded that there was a "a narrow exception" to the public aim requirement for cases in which defendants' conduct evinces a particularly high degree of bad faith. *Id.* at 196. Plaintiffs allegations do not fit within that narrow exception.

IV. *ORDER*

For the reasons discussed above, it is hereby

ORDERED that the motion of R.H. Love Galleries, R.H. Love Galleries, Inc., R.H. Love Contemporary, Inc., R.H. Love, LLC, and Richard Love (collectively, "Defendants") to dismiss the causes of action for fraud by Spanierman Gallery, PSP, Spanierman Gallery, LLC, and Adelson Galleries, Inc. (collectively, "Plaintiffs") is granted. Plaintiffs' fraud causes of action (numbers 5, 15, and 24) are dismissed with prejudice; it is further

ORDERED that the motion of Defendants to dismiss all of Plaintiffs' remaining causes of action as against defendants R.H. Love Contemporary, Inc., R.H. Love, LLC, and Richard Love (collectively the "Non-Signatory Defendants") is granted. Those causes of action (numbers 1-5, 7-14, and 16-27) are dismissed as against the Non-Signatory Defendants, with leave to replead; it is further

ORDERED that in the event Plaintiffs do not file amended pleadings within thirty (30) days of the date of this Order as authorized herein, those causes of action (numbers 1-5, 7-14, and 16-27) will be dismissed, with prejudice, as against the Non-Signatory Defendants; it is further

ORDERED that the motion of Defendants to dismiss Plaintiffs' causes of action for conversion, replevin, unjust enrichment and constructive trust as against R.H. Love Galleries and R.H. Love Galleries, Inc. (the "Signatory Defendants") is granted. Those causes of action (numbers 1, 3, 7, 8, 10, 12, 16, 17, 19, 21, 25, and 26) are dismissed with prejudice, as to the Signatory Defendants; it is further

ORDERED that the motion of Defendants to dismiss Plaintiffs' causes of action for punitive damages is granted. Those causes of action (numbers 5, 14, and 23) are dismissed with leave to replead; and it is finally

***6** ORDERED that in the event Plaintiffs do not file amended pleadings within thirty (30) days of the date of this Order as authorized herein, those punitive damages causes of action (numbers 5, 14, and 23) will be dismissed, with prejudice.

SO ORDERED.

2003 WL 22480055 (S.D.N.Y.)

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- 1:03CV03188 (Docket) (May. 06, 2003)

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EXHIBIT 6

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
George W. SIRADAS, Robin L. Siradas, Laszlo Takacs and Judith E. Takacs,
individually and on behalf of all others similarly situated, Plaintiffs,
v.
CHASE LINCOLN FIRST BANK, N.A., Chase Home Mortgage Corporation, Chase Manhattan Mortgage Corporation, Chase Manhattan Bank, N.A., and Federal Home Loan Mortgage Corporation, Defendants.
No. 98 CIV. 4028(RCC).

Sept. 30, 1999.

MEMORANDUM AND ORDER

CASEY, D.J.

***1** George W. Siradas, Robin L. Siradas, Laszlo Takacs and Judith E. Takacs (the "Plaintiffs") have brought a class-action suit against The Chase Manhattan Bank, successor by merger to the Chase Manhattan Bank, N.A. ("CMB"), and successor in interest to Chase Lincoln First Bank, N.A. ("Chase Lincoln"), and Chase Mortgage Services, Inc., (formerly known as Chase Manhattan Mortgage Corporation, formerly known as Chase Home Mortgage Corporation) ("CMSI") (collectively referred to as the "Chase Defendants") and Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the "Defendants") for their alleged unlawful practices in the servicing of Adjustable Rate Mortgages ("ARMs"). Plaintiffs have brought this suit on behalf of all persons whose six month treasury indexed Adjusted Rate Mortgage is or was owned or serviced by Defendants and who were damaged because of the method of calculation of interest.

The Supreme Court of the State of New York, County of New York, removed the instant case to this Court pursuant to 28 U.S.C. § 1446 [FN1] and 12 U.S.C. § 1452(f)(3). [FN2] According to 12 U.S.C. § 1452(f)(3), the Federal Home Loan Mortgage Corporation ("FHLMC"), a corporate entity created by the United States of America, organized and existing under the terms of the Emergency Home Finance Act of 1970, has the statutory right to remove this action to the District Court of the United States in the district and division embracing where the action is pending. Therefore, federal jurisdiction is appropriate.

FN1. 28 U.S.C. § 1446 sets forth the procedure for removal to federal court.

FN2. 12 U.S.C. § 1452(f)(3) provides, in pertinent part:
... any civil or other action, case or controversy in a court of a State, or in any court other than a district court of the United States, to which the Corporation is a party may at any time before the trial thereof be removed by [FHLMC], without the giving of any bond or security, to the district court of the United States for the district and division embracing where the same is pending ... by following any procedure for removal of causes in effect at the time of such removal.
12 U.S.C. § 1452(f)(3).

Before the Court is a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, as to all of the Takacses' individual claims, and a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure as to the Siradases' individual claims for violation of Section 349 and 350 of the New York General Business Law (McKinney 1991), unjust enrichment and money had and received, and breach of duty of fair dealing. [FN3] Both motions have been brought by The Chase Defendants.

FN3. Although the parties motion papers refer to the duty of fair dealing, such duty is commonly referred to as the duty of good faith and fair dealing. The Court will refer to this duty in a manner consistent with the parties' motion papers.

Also before the Court is a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6) , the aforementioned Plaintiffs' claims, brought by Defendant Freddie Mac. For the reasons set forth below, Defendants' motions are granted with respect to all of the Takacses' individual claims and the Siradases unjust enrichment, money had and received and breach of fair dealing claims, and denied with respect to the Siradases' deceptive practices claim.

FACTUAL BACKGROUND

The underlying facts in this case are not in controversy. In the mid-1980's, Plaintiffs George W. Siradas and Robin L. Siradas obtained a six month treasury-indexed adjustable rate mortgage ("ARM") loan from Chase Lincoln. *See* Answer ¶ 6. In 1986, Plaintiffs Laszlo Takacs and Judith E. Takacs obtained a six month treasury indexed ARM loan from Chase Lincoln. Fourth Amended Complaint ¶ 7; Answer ¶ 7. Plaintiffs' ARM loans provided that the interest rates were to be adjusted using the Auction Average every six months until the loans were paid off. Subsequently, Freddie Mac purchased the mortgage and owned the Siradases' loan at all relevant times.

***2** The Siradases' ARM loan provided that the interest rate could be adjusted every six months, based on the weekly auction average of the six-month United States Treasury Bills. *See* Fourth Amended Complaint ¶ 17; Answer ¶ 17. Such auction average may be obtained using two methods: (1) contacting the member banks of the Federal Reserve Board, newspapers or electronic information sources (collectively referred to as the "Telerate Method"); or (2) by consulting the Federal Reserve Board's Statistical Release H.15(519), which is publicized each Monday by the Federal Reserve Board ("H15 Method"). *See* Fourth Amended Complaint ¶ 18; Answer ¶ 18.

The adjustable rate rider attached to the Siradases' mortgage provides that the H15 method should be used. [FN4] In addition, Freddie Mac has published a policy which mandates use of the H15 method for six-month treasury indexed ARMs. [FN5]

FN4. The rider states: "Beginning with the first Change Date, my interest will be based on an Index. The "Index" is the weekly auction average on six-month United States Treasury bills, as made available by the Federal Reserve Board. The most recent Index figure available as of the date 45 days before each Interest Change Date is called the "Current Index." " *See* Fourth Amended Complaint ¶ 17.

FN5. A Freddie Mac bulletin states: "[T]he Treasury index will be considered to have been made available on the release date that appears on the Federal Reserve Statistical Release H.15(519)." *See* Freddie Mac Bulletin, No. 91--18 (Sept. 5, 1991).

According to Freddie Mac, the proper method for adjusting the interest rate on six month treasury indexed ARMs is the H15 method. *See* Fourth Amended Complaint, Exhibit C, Freddie Mac Bulletin, No. 91-18. Chase Manhattan serviced the Siradases' mortgage under an agreement with the owner, Freddie Mac, by making interest rate adjustments commencing June 1, 1986 and each and every June 1 and December 1 thereafter up to the time the loan was transferred to Mellon Mortgage in or about May 1995. At times, the Defendants used the Telerate method, rather than the H15 method to compute the Plaintiffs' interest rates. *See* Carson Decl. ¶ 4. In or about April of

1998, Joseph M. Carson, the Assistant Manager of Alternative Servicing for Chase Manhattan Mortgage Corporation ("CMMC") [programed] CMMC's computer to run analysis on the Takacses' loan from inception to payoff making interest rate adjustments on their ARM loan mortgage using the H15 Method. He compared this analysis to the Takacses' actual loan history and found that had the H15 method been used, Plaintiffs would have been charged $55.72 more in interest over the life of the loan than they were actually charged. *Id.*

DISCUSSION

I. *The Takacses' Claims*

The Takacses claim breach of contract, violation of New York General Business Law Section 349 and 350 (the "Deceptive Practices Act"), unjust enrichment, and breach of the duty of fair dealing. The Chase Defendants move for summary judgment on all of these claims.

Summary Judgment may only be granted when, "there is no genuine issue as to any material fact [and] ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party carries the burden of demonstrating that there exists no genuine issue as to any material fact. *See Gallo v. Prudential Residential Services, Limited Partnership,* 22 F.3d 1219, 1223 (2d Cir.1994). All ambiguities must be resolved and all inferences must be drawn in favor of the non-moving party. *Id.* The moving party may also succeed on a summary judgment motion by showing that little or no evidence may be found in support of the non-moving party's case. *Id.*

***3** Each of the Takacses' claims is based solely on the allegation that they suffered damages due to Defendants charging them excessive interest. *See* Fourth Amended Complaint ¶¶ 47, 51, 55. However, the evidence demonstrates that not only were the Takacses not overcharged, but they were actually undercharged. An analysis showed that they paid less in interest than they would have if the Defendants had used the H15 method. *See* Decl. of Joseph Carson ¶ 4. The Plaintiffs have not presented any contradictory evidence on this issue, thus, there is no genuine issue of fact on the question of damages. As damages is an essential element on the Plaintiff's claim, the Defendants are entitled to summary judgment on the Plaintiffs' claims of breach of contract, violation of the Deceptive Practice Act and unjust enrichment.

The Takacses cannot maintain a cause of action, because they have not been damaged. *See* N.Y. Gen. Bus. Law § 349(h) (McKinney 1991) (allowing a cause of action to "any person who has been injured by reason of any violation of this section"); *Lexington 360 Associates v. First Union Nat'l Bank,* 234 A.D.2d 187, 651 N.Y.S.2d 490 (1st Dep't 1996) (granting defendant's motion for summary judgment where borrower could not prove that he suffered any damages as the result of the lender's alleged breaches); *Small v. Bank of New York,* 222 A.D.2d 667, 636 N.Y.S.2d 71 (2d Dep't 1995) (granting defendant's motion for summary judgment because plaintiff suffered no damages from defendant's conduct). The Takacses themselves admit that they have suffered no injury and request a voluntary dismissal without prejudice. *See* Plaintiffs' Memorandum in Opposition to Chase's Motion at 2-3.

Defendants are entitled to summary judgement on the Takacses' individual claims, because, on the specific facts of this case, the Takacses have demonstrated no injury.

II. *Deceptive Practices Act*

The Chase Defendants move for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure [FN6] regarding the Siradases' claim of violation of New York's Deceptive Practices Act. The Deceptive Practices Act, which applies to New York residents and New York transactions, provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce ... are hereby declared unlawful." N.Y. Gen. Bus. Law § 349-50. [FN7]

FN6. The Federal Rules state: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c).

FN7. The Court notes that the Plaintiffs, in the Fourth Amended Complaint, allege that The Chase Defendants violated Florida's uniform deceptive acts and practices statute, Fla. Stat. Ann. § 501.201 *et seq.*, which they claim applies to The Chase Defendants because Chase Mortgage is located in Florida and carried out the unlawful practices from Florida. None of the parties addressed this claim in their moving papers on the issues addressed herein, therefore, the Court will not address the applicability of this statute to the Defendants' motions. However, as the Court has denied the Defendants' motion with respect to the New York uniform deceptive acts and practices statute, the parties suffer no prejudice by omitting discussion on this issue here.

The standard for obtaining a judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is the same as the standard used for a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6): A court may dismiss the complaint only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cohen v. Koening,* 25 F.3d 1168, 1172 (2d Cir.1994), quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In this case, it does not appear beyond doubt that the Plaintiffs can prove no set of facts entitling them to relief under the Deceptive Practices Act.

*4 Plaintiffs maintain that the Chase Defendants violated the Deceptive Practices Act by deceptively using a formula for computing interest rate adjustment that was inconsistent with the formula agreed upon in the mortgage. *See* Fourth Amended Complaint ¶ 49. Defendants' motion for judgment on the pleadings regarding this claim is denied, given that Defendants' conduct could arguably meet all of the elements of a violation of the Deceptive Practices Act.

In order to prove a claim for deceptive practices the Plaintiff's must demonstrate that the act or practice was misleading in a material respect, and that the plaintiff was injured. *Schneider v. Citicorp Mortg.,* Inc., 1997 982 F.Supp. 897, 903 (E.D.N.Y.1997) (citing *Steinmetz v. Toyota Motor Credit Corp.,* 963 F.Supp. 1294, 1306 (E.D.N.Y.1997). There is no requirement that the Plaintiff show specific dollars injury. In order for the Plaintiffs to plead and prove their claims for relief under the Deceptive Practices Act, they must prove, at a minimum, that the conduct is consumer oriented, that Defendant's acts have a broad impact on consumers at large, and that there is injury to the public generally. *Occidental Chemical Corp. v. OHM Remediation Services Corp.,* 173 F.R.D. 74, 76-77 (W.D.N.Y.1997).

First, a miscalculation of interest rates by major servicers of mortgages in the United States clearly has a broad impact on consumers at large. *See Teller v. Bill Hayes, Ltd.,* 213 A.D.2d 141, 630 N.Y.S.2d 769 (2d Dep't 1995) (basing denial of a deceptive practices on the fact that the deceptive act did not have a sufficiently broad impact on consumers at large); *United Knitwear Co. v. North Sea Ins. Co.,* 203 A.D.2d 358, 359 (2d Dep't 1994) (requiring that claims under the Deceptive Practices Act be "harmful to the public at large"). Additionally, the Chase Defendants' practices are of a persisting nature, rather than isolated incidents. *See id.* at 359 (requiring that violations of the Deceptive Practices Act involve conduct "of a recurring nature."); *Teller,* 213 A.D.2d at 148, 630 N.Y.S.2d at 774 (the Deceptive Practices Act is not applicable to "single-shot" transactions). Unlike *Teller,* which involved deceptive conduct between only two parties, the Chase Defendants' deceptive practices extended to hundreds of thousands of borrowers. *See* Fourth Amended Complaint ¶ 12. This vast impact on consumers at large is the type of ongoing behavior which the Deceptive Practices Act was intended to censure.

Defendants argue that Plaintiffs' claim under the Deceptive Practices Act must be dismissed because it is "duplicative of their breach of contract claim." Defendants' Memorandum at 7. Defendants base this contention on the *Teller* court's statement that the Deceptive Practices Act "was not intended to turn a simple breach of contract into a tort," *Teller,* 213 A.D.2d 141 at 148. Additionally, Defendants refer to the *United Knitwear* court's denial of a claim under the Deceptive Practices Act because it "amounts to nothing more than a private contract dispute between the parties." *United Knitwear Co.,* 203 A.D.2d at 359. Defendants have taken these statements out of context to support their claim that the Deceptive Practices Act cannot apply to those deceptive practices which are rooted in contracts. The *Teller* court clearly bases its decision to deny the deceptive practices claim on the insufficient manner and extent to which the defendant's conduct impacts consumersnot the fact that a contract was involved. Only after a lengthy analysis of these factors does the court give its conclusory statement that the Deceptive Practices Act "was not intended to turn a simple breach of contract into a tort." *Id.*

***5** Similarly, the court in *United Knitwear Co.* based its denial of the claim under the Deceptive Practices Act on the fact that the deception was neither harmful to the public nor of a recurring nature. Only after an extensive examination of these factors, did the court conclude that there was nothing more than a simple breach of contract.

Because the mortgages serviced by the Chase Defendants clearly do have a broad impact and are of a recurring nature, their conduct amounts to more than a "simple breach of contract" and as such is subject to the Deceptive Practices Act. Although Plaintiffs supplied little evidence of other mortgagors who potentially were harmed by Chase's and Freddie Mac's practices, this is a factual issue. It is possible that evidence of such could be developed to demonstrate deceptive practices which caused harm to consumers. Therefore, the Defendants' motion for summary judgment on this point is denied.

III. *Claim of Unjust Enrichment*

Plaintiffs George and Robin Siradas also bring a quasi contract claim of unjust enrichment and money had and received. (*See* Fourth Amended Complaint ¶¶ 53-55); *see generally Rocks & Jeans Inc. v. Lakeview Auto Sales & Service, Inc.,* 184 A.D.2d 502, 502 (2d Dep't 1992) (holding that a claim for money had and received "sounds in quasi contract" and arises when "in the absence of an agreement, one party possesses money that in equity and good conscience it ought not retain"). Plaintiffs base this claim on the assertion that Defendants unjustly received their money through the charging of excessive interest rates.

Plaintiffs and Defendants agree that one may not maintain a claim in quasi contract where a contract governs the "particular subject matter of its claims for unjust enrichment." *See* Plaintiffs' Memorandum at 7 (quoting *Metropolitan Elec. Mfg. Co. v. Herbert Constr. Co.,* 183 A.D.2d 758, 759 (2d Dep't 1992)).

The only dispute here is whether Plaintiffs' claim in quasi contract covers subject matter different from that covered by the contract itself. Plaintiffs argue that the two claims cover two different subjects: the contract (the mortgage) governs the proper method to calculate interest rates, whereas the subject matter of the quasi contract claim "is not the method of calculation contained in the contract, but that the defendants did not use the method of calculation contained in the contract." Plaintiff's Memorandum at 8.

This analysis is unpersuasive. Simply rephrasing an affirmative, contractual obligation into a failure to uphold this obligation, does not create a new subject matter. The quasi contract claim does not have a subject matter independent from the contract itself. The Chase Defendants' motion for judgment of the pleadings with respect to Plaintiff's claim of unjust enrichment and money had and received against the Chase Defendants is dismissed, as there is no set of facts in support of the Plaintiffs' claim which would entitle them to relief. *Cohen,* 25 F.3d at 1172 (quoting *Conley,* 355 U.S. at 45-46).

IV. *The Duty of Fair Dealing*

***6** A party may maintain a claim for breach of the duty of fair dealing only if it is based on allegations different than those underlying the accompanying breach of contract claim. *See Geler v. National Westminster Bank USA,* 770 F.Supp. 210, 215 (S.D.N.Y.1991) (denying plaintiff's claim under breach of duty of fair dealing because the allegations of that claim presupposed a breach of the express terms of the contract). *Geler* is analogous to this case, in that the Siradas Plaintiffs have not asserted any basis for their breach of duty of fair dealing claim beyond the allegation that Defendants breached the contract.

Plaintiffs' reliance on *Davis v. Dime Bank of New York, FSB,* 158 A.D.2d 50 (Appel Div.3d Dep't 1990) (holding that a plaintiff could sue for breach of contract, as well as breach of fiduciary duty, only if the latter duty arose from more than the mere existence of the contract) is misguided for two reasons. First, the plaintiffs in *Davis* claimed breach of fiduciary duty, which involves a very different relationship between the parties and requires a different standard of conduct, [FN8] rather than breach of duty of fair dealing. Second, the *Davis* court found a fiduciary relationship between the parties which was based on allegations independent of the contract itself. There was no such special duty between the Siradases and the Chase Defendants, other than the duty of fair dealing which is implicit in every contract. *See Geler,* 770 F.Supp. at 215 (holding that every contract obligates the party to engage in fair dealing). The breach of that implicit duty to engage in fair dealing is merely a breach of the underlying contract. *Id.*

FN8. "The essence of a fiduciary relationship is that the fiduciary agrees to act as his principal's alter ego ...." *United States v. Ashman,* 979 F.2d 469, 478 (7th Cir.1992).

Plaintiffs cannot claim both breach of contract and breach of the duty of fair dealing, because the latter claim is not independent of the contract itself. For this reason, the Defendants' motion for judgment of the pleadings with respect to the Plaintiffs' breach of duty of fair dealing claim is granted.

V. *Plaintiff's Claims Against Freddie Mac*

Freddie Mac has brought a motion to dismiss all of the Plaintiffs' claims against it. For the reasons set forth below, the Court grants such motion as to each claim.

A. *Overcharging of Interest*

Plaintiffs are subject to New York Civil Practice Law and Rules § 215(6), because they seek recovery of an overcharge of interest. This law imposes a one year statute of limitations on an action to recover any overcharge of interest. C.P.L.R. § 215(6). This language clearly and unambiguously applies to any "monetary charge in excess of the proper, legal or agreed rate or amount." *Rubin v. City Nat'l Bank and Trust Co.,* 131 A.D.2d 150, 152 (3d Dep't 1987) (citation omitted). Plaintiffs rely on *Englishtown Sportswear, Ltd. v. Marine Midland Bank,* 97 A.D.2d 498, (2d Dep't 1983)(holding that C.P.L.R. § 215(6) only applies to usury actions), which directly contradicts the holding in *Rubin* (holding that the plain, ordinary meaning of CPLR 215(6) statutory language is clear on its face and such language is controlling). The Court will follow the more recent and thoughtful analysis provided in *Rubin. See Rubin,* 131 A.D.2d at 153 (holding that the ordinary meaning of the statute controls).

***7** When a statute is clear and unambiguous in its language, New York courts should not inquire as to legislative history to aid in its interpretation. *See Washington Post Co. v. New York State Insurance Dep't et al.,* 61 N.Y.2d 557, 565 (1984)("When the plain language of the statute is precise and unambiguous, it is determinative") (citation omitted); *see also* McKinney's Cons.Laws of N.Y., Book 1, Statutes at 76 (Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, "resort need not be had to other means of interpretation."). The language of C.P.L.R. § 215(6) is entirely clear, therefore, it would be inappropriate to examine the statute's legislative history.

Plaintiffs argue that the *Rubin* holding is limited to the facts of that case, and as such does not extend to overcharges of interest that are contractual rather than statutory. *See* Plaintiff's Memorandum at 4. This argument, however, overlooks the court's statement that "[W]hile this case and *Englishtown* are factually distinguishable, the question remains whether CPLR 215(6) extends to actions other than usury." *Rubin,* 131 A.D.2d 150 (3d Dep't 1987). Despite the differing factual backgrounds between the two cases, the *Rubin* court was clearly re-examining the same issue addressed by the *Englishtown* court. The *Rubin* court ultimately concludes that C.P.L.R. § 215(6) applies to any overcharge of interest--not just usury. *See Rubin,* 131 A.D.2d at 153. The Court grants Freddie Mac's motion to dismiss on this issue, because Plaintiffs' claim is barred by the statute of limitations.

B. *The Duty of Fair Dealing*

Plaintiffs' claim under breach of duty of fair dealing should be dismissed. As discussed above, *see supra* Section IV, New York courts have consistently denied claims of breach of duty of fair dealing when they are alleged together with breach of contract. *See OHM Remediation Services Corp. v. Highes Environmental Systems, Inc.*, 952 F.Supp. 120, 124 (N.D.N.Y.1997) (holding that New York does not recognize a simultaneous claim for breach of contract and breach of the duty of fair dealing). The Court grants Freddie Mac's motion to dismiss the Plaintiff's claim of breach of duty of fair dealing, accordingly.

C. *Unjust Enrichment*

Plaintiffs' claim for unjust enrichment and money had and received claim against Freddie Mac must be dismissed, as there is no set of facts in support of the Plaintiffs' claim which would entitle them to relief. *Cohen,* 25 F.3d at 1172 (quoting *Conley,* 355 U.S. at 45-46). Plaintiffs and Defendants agree that one may not maintain a claim in quasi contract where a contract governs the "particular subject matter of its claims for unjust enrichment." *See* Plaintiffs' Memorandum at 7 (quoting *Metropolitan Elec. Mfg. Co.,* 183 A.D.2d at 759). Simply rephrasing an affirmative, contractual obligation into a failure to uphold this obligation, does not create a new subject matter. The quasi contract claim does not have a subject matter independent from the contract itself. Therefore, Plaintiff's claim of unjust enrichment and money had and received against Freddie Mac is dismissed.

D. *Deceptive Practices Act*

***8** The Siradases' claim that Freddie Mac violated New York and Virginia [FN9] statutes by deceptively using a formula for computing interest rate adjustment that was inconsistent with the formula agreed upon in their mortgage, and inconsistent with Freddie Mac's policy.

FN9. The Virginia statute specifies certain unlawful practices, and prohibits all conduct "using any other deception, fraud, false pretense, or misrepresentation in connection with a consumer transaction." Va.Code Ann. §§ 59.1-200.

Although the Siradases' deceptive practices claim against the Chase Defendants has survived, their deceptive practices claim against Freddie Mac is dismissed. Unlike the Chase Defendants, Freddie Mac is not subject to the New York Deceptive Practices Act. Freddie Mac is also not subject to the Virginia Code §§ 59.1-200 regulating deceptive business practices.

1. *Freddie Mac is Not Subject to N.Y. Gen. Bus. Law §§ 349, 350*

The Deceptive Practices Act only applies to New York residents and New York transactions. *See Riordan v. Nationwide Mutual Fire Insurance Co.*, 977 F.2d 47, 52 (2d Cir.1992) (holding that the section applies to "every business operating in New York"), *see also Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 100 (S.D.N.Y.1997) (dismissing claim because Plaintiff has failed to allege any deceptive acts or practices by Chrysler that occurred within New York State, which is required to state a claim under the Deceptive Practices Act). However, Plaintiffs have failed to allege that Freddie Mac committed any deceptive practices or acts within

New York or is a New York resident.

Plaintiffs claim that Freddie Mac should not be able to absolve itself from liability simply by hiring a servicer to do that which it was obligated to do under the contract, suggesting that Freddie Mac be liable because of its relationship with The Chase Defendants, which is subject to the New York Deceptive Practices Act. Plaintiff's Memorandum at 11. However, Freddie Mac, as a government institution, is not liable for the deceptive conduct of its servicers. *See United States v. Zenith-Godly Co. Inc.,* 180 F.Supp. 611, 615 (S.D.N.Y.1960) ("While a private person may be bound by acts of his agents that are not within the actual bounds of the agent's authority, it does not follow that the Government may be bound by the apparent authority of its agents"). Therefore, there may be no liability under the Deceptive Practices Act on the part of Freddie Mac, and Defendants' motion to dismiss on this issue is granted.

2. *Freddie Mac Is Not Subject to Va.Code Ann. §§ 59.1-200*

Freddie Mac is not subject to the Virginia Consumer Protection Act ("VCPA") for two reasons. First, consumer real estate transactions are governed by 15 U.S.C.S. § 1603, and are therefore not subject to the VCPA. *See Smith v. United States Credit Corp.,* 626 F.Supp. 102 (E.D.Va.1985) (holding that consumer real estate transactions are not subject to the VCPA, because they are exclusively under the domain of 15 U.S.C.S. § 1603 , the Federal Consumer Credit Act).

Plaintiffs attempt to distinguish this case from *Smith* by arguing that although 15 U.S.C.S. § 1603 does regulate consumer real estate transactions in general, it does not specifically regulate interest rate adjustments on ARM loans. Plaintiffs then conclude that since this conduct is not regulated by the Federal statute, it is subject to the VCPA. *See* Plaintiffs' Memorandum at 12, 13. Plaintiffs are incorrect in their assertion that interest rate adjustments on ARM loans are not subject to 15 U.S.C.S. § 1603. Although the federal statute does not specify that this particular type of conduct is within its ambit, its general phrasing includes the deceptive calculation of interest rates. *See* 15 U.S.C.S. § 1603. The statute's statement of its own purpose supports a broader construction: "[i]t is the purpose of this title ... to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *Id.*

***9** Secondly, the VCPA does not apply here because Freddie Mac is not a supplier. The VCPA only regulates suppliers. The statute defines the term "supplier" to mean "a seller or lessor who advertises, solicits or engages in consumer transactions, or a manufacturer or distributor who advertises and sells or leases goods or services to be resold or leased by other persons in consumer transactions." Va.Code § 59.1-198. Freddie Mac is clearly not a seller or lessor--it has not sold goods or services to Plaintiffs. Rather, Freddie Mac purchased the mortgage after the loan had already been given to Plaintiffs. Finally, Freddie Mac did not engage in "consumer transactions." The VCPA defines consumer transactions as, "[t]he advertisement, sale, lease or offering for sale or lease, of goods or services to be used primarily for personal, family or household services." Va.Code § 59.1-198. "Goods" are defined to include "all real, personal or mixed property, tangible or intangible." Id. This does not apply to Freddie Mac.

For both of the above reasons, Freddie Mac is not subject to the VCPA, and Plaintiff's deceptive practices claim against Freddie Mac is dismissed.

CONCLUSION

For the above reasons, the Court dismisses all of Plaintiffs' claims against Freddie Mac, and all of the individual claims brought by the Takacses against Defendants. Finally, the Court dismisses the Siradases' claims of unjust enrichment and their claim of breach of duty of fair dealing. The Court denies the Defendant's motion to dismiss the Siradases' deceptive practices claim against the Chase Defendants.

SO ORDERED:

1999 WL 787658 (S.D.N.Y.)

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